



## ATTACHMENT 15

800 CONNECTICUT AVE., N.W.  
WASHINGTON, D.C. 20006-2701  
TELEPHONE: 202/452-8444  
FAX: 202/429-4519  
E-MAIL: FMI@FMI.ORG  
WEBSITE: HTTP://WWW.FMI.ORG

June 8, 1999

Ms. Margaret Wittenburg  
Processing, Handling and Labeling Committee  
National Organic Standards Board  
U.S. Department of Agriculture  
Washington, DC

Dear Ms. Wittenberg:

Thank you for requesting the Food Marketing Institute's (FMI's) input on the issue of retail handling guidelines for organic agricultural products. As the purchasing agents for consumers, FMI and its members strongly support the integrity of organic agricultural products and are committed to ensuring that consumers receive the full quality and value of the foods that they purchase.

The purpose of this letter is to respond to the request of the National Organic Standards Board's (NOSB's) Processing, Handling and Labeling Committee (the Committee) for comments on "whether a formal process of registration or of certification should be mandatory for retail operations selling organic products." As discussed more fully below, the Organic Food Production Act (OFPA) excludes final retailers who only sell organic agricultural products from the Act's certification requirements. Accordingly, no formal registration or certification can be mandated under the current law for retailers who only sell organic agricultural products. Nonetheless, we would be pleased to assist in the development of a good organic retail practices guideline that retailers may opt to use on a voluntary basis.

For your information, FMI is a non-profit association that conducts programs in research, education, industry relations and public affairs on behalf of its 1,500 members and their subsidiaries. Our membership includes food retailers and wholesalers, as well as their customers, in the United States and around the world. FMI's domestic member companies operate approximately 21,000 retail food stores with a combined annual sales volume of \$220 billion, which accounts for more than half of all grocery sales in the United States. FMI's retail membership is composed of large multi-store chains, small regional firms, and independent supermarkets. Our international membership includes 200 members from 60 countries.

### **A. Legal Framework**

#### **1. Organic Food Production Act**

The OFPA requires the U.S. Department of Agriculture (USDA) to establish an organic certification program for producers and handlers of agricultural products that have

been produced using the organic methods provided for in the Act. 7 U.S.C. § 6503(a). Although specifically tasked with assisting in the development of standards for substances to be used in organic production, USDA may also seek NOSB's advice on the general development of the certification program. 7 U.S.C. § 6518. USDA's program must require agricultural products that are sold or labeled as organically produced to be produced only on certified organic farms and handled only through certified organic handling operations. 7 U.S.C. § 6506. Producers and handlers that would like to participate in a program of this nature must develop an organic plan that is submitted to the appropriate certifying agent for review. 7 U.S.C. § 6513(a).

Congress recognized that placing stringent certification requirements on final retailers of agricultural products that do not process them would be burdensome and would not provide a meaningful benefit. Accordingly, these final retailers are expressly excluded from the OFPA's definitions of "handler" and "handling operation" and, therefore, are not required to undergo the certification process.

To understand the exemption that Congress enacted, it is helpful to look at the relevant definitions. The term "handle" is defined as "to sell, process or package agricultural products." 7 U.S.C. § 6502(8). A "handler" is "any person engaged in the business of handling agricultural products, *except such term shall not include final retailers of agricultural products that do not process agricultural products.*" 7 U.S.C. § 6502(9) (emphasis added). A "handling operation" is defined as "any operation or portion of an operation (*except final retailers of agricultural products that do not process agricultural products*) that (A) receives or otherwise acquires agricultural products and (B) processes, packages or stores such products." 7 U.S.C. § 6502(10) (emphasis added).

Thus, by subtracting the references to processing from the definitions for handler and handling operation, it is clear that final retailers who only "sell . . . or package agricultural products" are not considered handlers, and retailers who simply "receive or otherwise acquire agricultural products and . . . package or store such products" are not properly considered handling operations. As such, final retailers who engage in these activities are not subject to the OFPA's certification requirements.

## 2. Proposed Regulations

On December 16, 1997, USDA issued proposed rules to establish a National Organic Program (NOP). 62 Fed. Reg. 65850 (Dec. 16, 1997). In keeping with the OFPA, the proposed rules include a specific exemption for retail operations, or portions of such operations, that handle organically produced agricultural products but do not process them. Proposed Section 205.202(a)(2). Furthermore, the Agency proposed an exclusion for certain preparatory activities because the Agency determined that requiring certification would be burdensome and unnecessary, and would not contribute to assuring the integrity of the organically produced product. 62 Fed. Reg. at 65904-05.

Specifically, USDA proposed to exclude retail operations that conduct certain minimal preparatory activities with organically produced agricultural products in the course of the company's normal retail operations, provided that the retailer did not repackage the products under its own organic label. Proposed Section 205.202(b)(3). Examples of the types of activities that the Agency considered as appropriate for this exclusion are as follows:

- Washing and sorting fresh produce for display in bulk;
- Cutting cheese from a bulk wheel and placing weight labels on the cheese packages;
- Repackaging two pound bags of organic brown rice from a 50 pound sack and placing weight labels on the two pound base; and
- Allowing consumers to package their own bags of organic grain from a bulk container.

62 Fed. Reg. at 65905. These are examples of customary retail practices that are often necessary to sell agricultural food products, regardless of whether they are produced by organic or conventional means.

To qualify under the proposed exclusion, the retailer would also need to satisfy the following two requirements. First, the operation would be required to use only products that had been labeled as organic or made with certain organic ingredients before they had been acquired by the retailer. Second, the activities would need to occur in the course of the retailer's normal business practices solely for the purpose of presenting or offering the product to a consumer. 62 Fed. Reg. at 65905.

### 3. Committee Request for Comment

On January 5, 1999, the NOSB's Processing, Handling and Labeling Committee requested comments on "whether a formal process of registration or of certification should be mandatory for retail operations selling organic products." In particular, the Committee requested input from retailers regarding which of the following options they believed was most appropriate for retail operations who sell organic products:

- Voluntary organic handling guidelines to assist retailers in developing organic handling plans;
- A registration system with the state compliance branch in which spot inspections would be conducted by county inspectors who can issue fines for violations of good organic handling practices and stop sales against products with fraudulent labeling; or
- A mandatory third party organic certification, which includes a mandatory organic handling plan, similar to that which is required for an organic producer or manufacturer.

The Committee also requested information on practices retailers currently use to protect the organic integrity of agricultural products, the challenges retailers face,

types of assistance that would be useful to retailers to develop an effective organic handling plan.

## **B. Comments**

### **1. Guidance for Retailers**

As discussed more fully above, Congress made a clear and intentional decision to exclude from the definitions of handler and handling operation – and, thus, from the organic certification requirement – final retailers of organic agricultural products who only acquire, sell or package those products for retail sale. 7 U.S.C. § 6502(9), (10). Given the experience gleaned in the intervening years between the enactment of the OFPA and the issuance of the draft regulations, USDA reasonably interpreted the statutory exemption to include those minimal preparatory activities that constitute customary retail practices and are necessary to carry out the actual sale of the food product.

Indeed, requiring certification for the activities that USDA identified – *e.g.*, washing and sorting fresh produce, cutting cheese from a bulk wheel, allowing consumers to package their own bags of organic grain – would lead to an absurd result, since these activities do not adversely affect the organic integrity of the food, but certification would place difficult and costly burdens on retailers. Requiring certification under these circumstances might well mean a decline in retailers – both large and small – that would be willing or able to carry organic agricultural products and could be a prohibitively costly burden for small, community food co-operatives. *See, e.g.*, Editorial “We Favor Voluntary Certification,” 11 Organic Food Business News 3 at 5 (March, 1999) (certification is an “unnecessary expense;” voluntary programs are the “least costly, least bureaucratic and easiest way to accomplish assurance that organic products are being handled correctly”). The regulations that implement the legislation that was intended to help the organics industry grow should not impede that process.

As the OFPA does not authorize USDA to require final retailers of agricultural products to participate in the mandatory certification program, the mandatory state registration or mandatory third party certification options proposed by the Committee would not be consistent with the OFPA. Moreover, these programs are likely to impose significant burdens on retailers, especially small, community food co-operatives and the like. Furthermore, since the organics community sought the enactment of the OFPA in 1990 to bring uniform national standards for those who produce organic agricultural products, requiring retailers to register in individual states or to obtain third party certification from any number of private certifying bodies would subject retailers to the same multitude of standards that producers sought to eliminate.

Accordingly, if the Committee, and by extension the NOSB, decides that retailers should receive guidance, we recommend that voluntary industry guidelines be developed. In this regard, we were pleased to review the draft document entitled, “Standards for Retailing of Organic Products” that we understand was prepared by the Organic Trade Association.

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We understand further that these are intended to be voluntary operating guidelines. We believe the document provides an excellent foundation and we would be pleased to assist in its further development so that it will best protect the integrity of organic agricultural products that are offered to consumers through retail food stores.

## 2. Organic Handling Practices Currently Used by Retailers

In addition to the foregoing, the Committee requested information on the handling practices currently used by retailers of organic agricultural products. The following is a summary of the practices identified by some of our members in response to a questionnaire we issued on the subject as a result of the Committee's request for information:

- Organic produce is palletized and stored separately;
- Produce that requires washing is washed in designated, sanitized basins and returned to designated pallets or racks;
- Trimming is performed with tools designated for organic foods;
- Organic meats are cut first in a sterilized shop;
- Organic items are clearly marked;
- Bulk organic items are stored in separate bins with separate scoops;
- Food handlers are trained regarding procedures for organic products;
- Specific and appropriate pest control procedures are employed; and
- Organic agricultural products are displayed to avoid commingling, customer confusion, or contamination.

Thus, retailers are using handling practices similar to those advocated by the Committee, regardless of whether they are required or necessary to maintain organic integrity.

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We appreciate your request for our comments and we look forward to working with you further on this matter. In the interim, if you have any questions regarding our submission, or if we may be of assistance in any other way, please do not hesitate to call on us.

Cordially yours,



Deborah R. White  
Regulatory Counsel